Supreme Court, U.S.
FILED
FEB 9 1979
MICHAEL RODAK, JR., CLERK

No. 78-630

# In the Supreme Court of the United States

OCTOBER TERM, 1978

STATE OF WASHINGTON, ET AL., APPELLANTS

*v.*

CONFEDERATED TRIBES OF THE COLVILLE INDIAN RESERVATION, ET AL.

*ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF WASHINGTON*

## MOTION TO DISMISS

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## MOTION TO DISMISS

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The Solicitor General, on behalf of the United States, moves to dismiss this appeal on the ground that it is not within the jurisdiction of this Court.

### OPINION BELOW

The opinion of the three-judge district court (J.S. App. 1-65) is reported at 446 F. Supp. 1339.

### JURISDICTION

The orders declaring Wash. Rev. Code 37.12, 82.08, 82.12, 82.24, 82.26, 82.44, 82.50, 82.24.090, 82.26.060,

82.08.050 and 82.08.070 invalid and enjoining their enforcement with respect to certain transactions were entered on May 10, 1978. By order filed July 17, 1978, the court denied a timely motion for a new trial. Notices of appeal to this Court from the portion of the district court's decision holding Wash. Rev. Code 82.44, 82.50, and 37.12 invalid were filed on July 12, 1978. A second notice of appeal to this Court from the district court's decision holding Wash. Rev. Code 82.24 invalid was filed on August 14, 1978.

## QUESTION PRESENTED

Whether a three-judge district court was properly convened under the former 28 U.S.C. 2281 to hear the claim that the State could not constitutionally seize shipments of cigarettes en route to an Indian reservation in interstate commerce.

## STATEMENT

This is an appeal from two cases heard by a three-judge court convened in the Eastern District of Washington. One of the cases, No. 3909 below (which we will refer to as the *Yakima* case), was brought by the United States of America on behalf of the Confederated Bands and Tribes of the Yakima Nation and their members (the Yakima Tribe). The Yakima Tribe intervened as a party plaintiff (J.S. App. 47). This action sought to enjoin the application of state cigarette, tobacco products, and sales taxes to tribal sales on the Yakima Reservation, and to enjoin the



enforcement of those taxes through the seizure by the State of tribal property (J.S. App. 47-48).

The other case, No. 3868 below (which we will refer to as the *Colville* case), was brought by the Confederated Tribes of the Colville Indian Reservation, the Lummi Indian Tribe, and the Makah Indian Tribe. The United States is not a party to the *Colville* case. That action sought not only to enjoin the application of the state cigarette and tobacco products taxes to tribal sales on the plaintiff tribes' reservations, but also to enjoin the application of state motor vehicle and trailer excise taxes to property located on the reservations and owned by tribal members or by the tribes (J.S. App. 3). In addition, the *Colville* case sought to enjoin state exercise of civil and criminal jurisdiction over the tribes and their members residing on the reservations (J.S. App. 3).

Although the parties stipulated that the cases be consolidated for hearing (J.S. App. 2), and a single opinion was issued, the cases remained otherwise distinct, and separate judgments were entered (J.S. App. 66-70, 71-74). Accordingly, our motion addresses only the appeal from the judgment in the Yakima case.

The Yakima Tribe is a federally recognized Indian tribe with a governing body, the Yakima Tribal Council, which is recognized by the Secretary of the Interior (J.S. App. 48). The Tribe occupies the Yakima Indian Reservation, established by the Treaty with the Yakimas, 12 Stat. 951, which encompasses approximately 1,390,000 acres in south-central Washington

(J.S. App. 48). The Tribe has a membership of more than 6,000, most of whom reside on the Reservation. Non-Indians and Indians who are not members of the Tribe also reside on the Reservation (*ibid.*).

The Tribe owns and operates several tribal enterprises on the Reservation, including furniture manufacturing, boat and housing component manufacturing, Indian arts and crafts, fish and food processing, and newspaper distributing (*id.* at 50 n.6). The Tribal Council has enacted a Tribal Ordinance that regulates and taxes the sale of cigarettes and other tobacco products on trust land within the Reservation (J.S. App. 142-145). The ordinance provides that all persons engaged in the business of selling cigarettes or other tobacco products on trust land within the Reservation must obtain a permit from the Tribe (*id.* at 142-143). The permittee must obtain his cigarettes from the Tribe, employ only members of the Tribe, and sell at a price fixed by permittees of the Tribe (*id.* at 143-144). The Tribe charges a fixed fee of $25 per year for a permit and 2.25 cents per package of cigarettes sold (*id.* at 143). In 1975, the Tribe collected more than $278,000 from the cigarette and tobacco products tax (*id.* at 49). The Tribe expended these monies on its programs for the educational, social, and economic advancement of its members (*ibid.*).

In 1972, the State of Washington assessed the Yakima Tribe $650,333.88 in cigarette taxes, penalties, and interest. The State subsequently filed



notices to withhold delivery of tribally purchased cigarettes with interstate common carriers and the United States Postal Service (J.S. App. 6, 47). After the present suit was filed, the district court restrained such actions pending resolution of this case (*ibid.*).

The State of Washington has enacted several taxing schemes that are at issue in this litigation. It imposes an excise tax on cigarettes in the amount of $1.60 per carton. Wash. Rev. Code 82.24.020. Although the tax is initially imposed on the wholesaler or retail dealer, the statute has been interpreted to impose the tax on the consumer if neither the wholesaler nor retailer had been subject to the state tax (*id.* at 20-23).[1] The State also imposes both a floor stocks tax and an excise tax on tobacco products other than cigarettes. Wash. Rev. Code 82.26.020; J.S. App. 23 n.15.

The state retail sales tax applies to each retail sale within the State unless taxation is constitutionally prohibited. Wash. Rev. Code 82.08.020. The tax is imposed on the buyer, but is collected by the seller. Wash. Rev. Code 82.08.050. If the seller fails to collect the tax, he is personally liable to the State for the amount of the tax (*ibid.*).

The State conceded that it cannot tax sales to members of the Tribe on the Reservation (J.S. App. 5).

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[1] A 1972 amendment added "possession" as a legal object of taxation, but exempted possession of up to two cartons of cigarettes. 1972 Wash. Ex. Sess. Laws, ch. 157, §§ 6 and 7. A 1975 amendment deleted the two-carton exemption. 1975 Wash. 1st Ex. Sess. Laws, ch. 22.

The State, however, has promulgated administrative regulations that require tribal retailers to register with the State and to maintain records that "demonstrate entitlement to make such sales without collection of tax." Wash. Excise Tax Bulletin 504.08.192 (November 24, 1976). The retailer must list each sale exempt from tax and demand tribal identification from purchasers personally unknown to him. *Ibid.*

After consolidation of the *Yakima* case and the *Colville* case for hearing, the district court held the cases pending this Court's disposition of *Moe* v. *Confederated Salish & Kootenai Tribes of the Flathead Reservation*, 425 U.S. 463 (1976); and *Bryan* v. *Itasca County*, 426 U.S. 373 (1976). Following the decisions in those cases, the district court entered a single opinion (J.S. App. 1-65). In both of these cases, the court ruled that the three-judge court had been properly convened because Washington's application of state statutes authorizing seizure of property to tribally owned goods moving in interstate commerce raised substantial constitutional questions under the Interstate Commerce Clause (*id.* at 13-14, 47, 51).

Turning to the merits, the court concluded in both cases that the state tobacco products taxes constituted unlawful direct taxation of Indian income from on-reservation activities because the taxes fell on the tribal retailer and not the consumer (*id.* at 23, 52). Next, the court held that imposition of the state cigarette tax on sales taxed by the tribes was an unlawful interference with tribal self-government and was preempted by the tribal ordinances (*id.* at 34-41,



52). Finally, it held the record-keeping and reporting requirements imposed by the State's administrative regulations to be unauthorized by federal law and invalid (J.S. App. 30, 52).

In the *Yakima* case, the court also held that the state retail sales tax was not preempted nor an interference with tribal self-government except insofar as it applied to sales of cigarettes by tribal retailers. The court held that insofar as the sales tax applied to on-reservation cigarette sales, it was preempted by the Yakima tribal ordinance (*id.* at 52-58).

The court issued separate judgments (*id.* at 66-70, 71-74). Each order declared unlawful the application of state cigarette and tobacco products taxes to on-reservation sales by Indians to non-Indians, and restrained appellants from enforcing such taxes with respect to such sales (*id.* at 67, 69, 72-73). Each order declared unlawful the requirements that the tribal sellers record and report to the State on-reservation sales by Indians to non-Indians, and restrained appellants from enforcing such taxes with respect to such sales (*ibid.*). Each order declared unlawful the requirements that the tribal sellers record and report to the State on-reservation sales not subject to state taxation, and enjoined the enforcement of these requirements with respect to such on-reservation sales (*id.* at 68-69, 72-73). The *Yakima* judgment also included a declaration that the state sales tax on tribal cigarette sales had been preempted by the tribal ordinance, and it restrained the collection and enforcement of that tax in connection with on-reservation sales of

cigarettes by members of the Yakima tribe to non-Indians (*id.* at 72-74).

## ARGUMENT

Appellants seek to invoke this Court's jurisdiction under 28 U.S.C. 1253, which authorizes a direct appeal from an order granting an injunction in a suit "required by any Act of Congress to be heard and determined by a district court of three judges." We submit that this case[2] was not one required to be heard by a three-judge district court, and that consequently this appeal is not within the Court's appellate jurisdiction. See, *e.g.*, *Swift & Co.* v. *Wickham*, 382 U.S. 111, 129 (1965). Appellate review lies in the court of appeals. *Ibid.*[3]

The court below erroneously concluded that a three-judge district court was required by the former 28 U.S.C. 2281.[4] That statute provided that an injunc-

[2] We refer, of course, to the *Yakima* case.

[3] We bring the jurisdictional problem to the Court's attention not without embarrassment, since in the district court the government urged that a three-judge court was proper. See Plaintiff's Trial Brief 2-3 (filed February 28, 1977). The government only contended, however, that such a court was needed to hear the Tribes' claim that on-reservation sales were exempt from state taxation. As noted below, that contention is inconsistent with this Court's decision in *Moe* v. *Confederated Salish & Kootenai Tribes of the Flathead Reservation*, 425 U.S. 463, 481 (1976), and the district court accordingly declined to convene a three-judge court to hear that claim.

[4] Although Section 2281 was repealed by Section 1 of the Act of August 12, 1976, Pub. L. No. 94-381, 90 Stat. 1119, it remained in effect with respect to suits pending at the date of the repeal, as this one was. Section 7, 90 Stat. 1120.



tion "restraining the enforcement, operation or execution of any State statute by restraining the action of any officer of such State in the enforcement or execution of such statute * * * upon the ground of the unconstitutionality of such statute" could be ordered only by a three-judge district court.

The court below correctly recognized (J.S. App. 13) that a three-judge court was not required to hear the Tribes' attacks on the state cigarette and sales taxes themselves, since those attacks raised "only Supremacy Clause issues which do not fall within the scope of 28 U.S.C. § 2281." See *Moe* v. *Confederated Salish & Kootenai Tribes of the Flathead Reservation*, 425 U.S. 463, 481 n.17 (1976); *Swift & Co.* v. *Wickham*, *supra*.

The court held, however, that a three-judge court was required because of the Tribes' additional attack on "the State's statutes providing for the enforcement of its taxing measures through the declaration and seizure as contraband of unstamped cigarettes moving in interstate commerce" (J.S. App. 14). Citing *Department of Employment* v. *United States*, 385 U.S. 355 (1966), and *Steffel* v. *Thompson*, 415 U.S. 452 (1974), the court concluded (J.S. App. 14 & n.11) that a three-judge court was required because the Tribes sought to enjoin state statutes on the ground they were unconstitutional as applied.

The district court's analysis ignored the distinction between "a petition for injunction on the ground of

the unconstitutionality of a *statute*, either on its face or as applied"—which requires the convening of a three-judge court under Section 2281—and "a petition seeking an injunction on the ground of the unconstitutionality of the *result* obtained by the use of a statute not attacked as unconstitutional," which does not require a three-judge court. *Turner* v. *Fouche*, 396 U.S. 346, 353-354 n.10 (1970) (emphasis in the original).

The district court characterized the claim of the Tribe and the United States as a "challenge of the State's statutes providing for the enforcement of its taxing measures through the declaration and seizure as contraband of unstamped cigarettes moving in interstate commerce" (J.S. App. 14).[5] As this statement itself indicates, the focus of the constitutional claim was on the *result* of the states officials' enforcement efforts, and not on the general statutory provision for enforcement of taxing measures through the seizure of untaxed goods. There is, of course, no state statute at issue which provides specifically for the seizure of goods moving in interstate commerce. Indeed, the court did not identify any specific state statute or statutes as the subject of the Tribal challenge (see J.S. App. 13-14).[6]

[5] A similar characterization of the issues is reflected in the supplemental pretrial order filed by the court on February 28, 1977. See *id.* at 2, 22, 26-27, 30.

[6] This case is distinguishable from *Query* v. *United States*, 316 U.S. 486 (1942), and *Department of Employment* v. *United States*, 385 U.S. 355 (1966), where three-judge courts were properly convened to consider whether state statutes



The United States and the Yakima Tribe argued, in essence, that state agents, in carrying out their statutory responsibility to enforce the State's excise tax, could not interfere with shipments travelling to the reservations in interstate commerce. Similarly, in *Phillips* v. *United States*, 312 U.S. 246, 252 (1941), a constitutional challenge to the actions of the state governor, taken pursuant to his statutory and constitutional authority, was held not to require a three-judge court because the challenge was aimed essentially at the constitutionality of the administrative action, not of the general statutory provisions. Cf. *William Jameson & Co.* v. *Morgenthau*, 307 U.S. 171 (1939). In drawing this distinction in *Phillips*, the Court cautioned that the statutory provision for a three-judge court was not "a measure of broad social policy to be construed with great liberality," but "an enactment technical in the strict sense of the term and to be applied as such." 312 U.S. at 251. "The crux of the business," the court emphasized, "is procedural protection against an improvident state-wide doom by a federal court of a state's legislative policy." *Ibid.* See also *Ex parte Bransford*, 310 U.S. 354, 361 (1940) (footnote omitted): "Even where the statute is attacked as unconstitutional, [the three-judge court

having mandatory statewide application to all transactions of a certain type could constitutionally be applied to federal instrumentalities. Here, the enforcement provisions offer substantial discretion, and the United States and the Tribe contended that state officials could not enforce them in such a way as to interfere with interstate commerce.

provision] is inapplicable unless the action complained of is directly attributable to the statute."

The argument of the Yakima Tribe and the United States here did not threaten "state-wide doom" to a state legislative policy. They simply contended that state officers could not enforce the taxing statute by stopping certain shipments of cigarettes.[7] A three-

[7] The Amended Complaint filed by the United States did not refer to any specific state statute. It alleged (para. 14) that the conduct complained of—including the seizure of the shipments of cigarettes—was unlawful and improper in the following respects:

a. Defendant's actions are an unlawful interference with Indian commerce.

b. Defendant is unlawfully exceeding its jurisdiction.

c. Defendant's actions are an unconstitutional interference with commerce with and upon an Indian Reservation.

d. Defendant's actions are an unlawful interference with plaintiff as Congress has pre-empted the field of regulation of commerce in and to Indian Reservations.

e. Defendant's actions are an unlawful interference with the internal affairs of the Yakima Indian Nation and the licensed Indian retailers of the Yakima Indian Nation.

f. Defendant's actions are an unlawful levy and attachment of properties of the Yakima Indian Nation which are free from levy and attachment under treaty and under the express terms under which the State of Washington gained admission to the Union.

g. Defendant's actions are destructive of the commerce of the Yakima Indian Nation and its licensed Indian Retailers and fail to provide the Yakima Nation and its licensed Indian Retailers with due process of law.

The Complaint In Intervention filed by the Yakima Tribe



judge court was not required to hear that claim.

alleged (para. 11) that appellants' conduct was unlawful and improper in the following respects:

A. Defendant's actions are an unconstitutional interference with Indian and interstate commerce.

B. Defendant is attempting to make the Yakima Indian Nation a taxpayer contrary to state and federal law.

C. Defendant is unlawfully exceeding its jurisdiction.

D. Defendant's actions are an unconstitutional interference with commerce to and upon Indian Reservation.

E. Defendant's actions are an unlawful interference with plaintiff as Congress has pre-empted the field of regulation of the commerce of cigarettes in and to Indian Reservations.

F. Defendant's actions are an unlawful interference with the internal affairs and inherent sovereignty of the Yakima Indian Nation.

G. Defendant's actions are an unlawful levy and attachment of properties of the Yakima Indian Nation which are free from levy and attachment under treaty and under the express terms of Defendant's admission to the Union.

H. Defendant's actions are unlawfully confiscatory, destructive of the commerce of the Yakima Indian Nation and fail to provide the Yakima Nation with due process of law or equal protection of the laws pursuant to the United States Constitution.

The Yakima Complaint in Intervention, like the government's complaint, did not identify particular state statutory provisions, and the relief sought was a declaration that (Complaint para. C) "the several 'Notice and Order to Withhold and Deliver (continuing levy)' issued by defendants against numerous companies, businesses, and corporations regularly engaged and doing business in interstate commerce and transport are invalid and unenforceable for levying upon, attaching, or commanding delivery of plaintiffs' personal or other properties to the Department of Revenue of the State of Washington."

## CONCLUSION

The appeal should be dismissed.[8]

Respectfully submitted.

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FEBRUARY 1979

[8] The Court may wish to vacate the judgment of the three-judge court and remand for the entry of a fresh judgment from which appellants can perfect a timely appeal to the court of appeals. See, *e.g.*, *Phillips* v. *United States*, *supra*, 312 U.S. at 254.

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